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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

MAHAN TALESHPOUR, RORY FIELDING,  
PETER ODOGWI, WADE BUSCHER,  
GREGORY KNUTSON, DARIEN HAYES,  
LIAM STEWART, NATHAN COMBS, and  
KENDALL BARDIN on behalf of themselves  
and all members of the putative class,

Plaintiffs,  
v.

APPLE INC.,

**Defendant.**

Case No. 5:20-cv-03122-EJD

**PLAINTIFFS' OPPOSITION TO  
DEFENDANT'S MOTION TO DISMISS  
SECOND AMENDED COMPLAINT**

Date: October 22, 2020

Time: 9:00 a.m.

Dept.: Courtroom 4 – 5th Floor

Judge: Honorable Edward J. Davila

**REDACTED**  
**FILED UNDER SEAL**

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## INTRODUCTION

This is a consumer class action brought by nine Plaintiffs on behalf of those who purchased a MacBook Pro 2016 model or later. The Plaintiffs allege these models use display cables that are tightly wrapped around the display controller board. As the screen is opened and closed, these cables stretch and rub against the control board, causing them to rip and tear over time. This results in a “stage lighting” effect, blocks of solid colors that obscure text and images, and eventual complete screen failure. Plaintiffs allege several state consumer protection causes of action as a result of this defect.

Apple responds by seeking a complete dismissal of Plaintiffs' complaint. It claims the Court lacks subject-matter jurisdiction over all nine of Plaintiffs' claims because none of their laptops purportedly have the defect alleged in the complaint. But this argument is based on a mischaracterization of Plaintiffs' allegations and a premature request for the Court to adjudicate the merits of this case at the pleading stage. In support of its argument, Apple relies on a declaration filled with baseless conclusions and purported factual findings. Apple also claims all 20 of Plaintiffs' causes of action are improperly pled. But these arguments misconstrue both the facts and the law. Contrary to Apple's claim, Plaintiffs' consumer protection claims are not all "grounded in fraud." And the few that are satisfy the heightened pleading standard for fraud claims. Apple's other pleadings challenges either misstate the pleading requirements or again misrepresent Plaintiffs' allegations to fit their arguments. Apple's motion should be denied.

## **FACTUAL BACKGROUND**

Apple updated and redesigned its line of 13- and 15-inch MacBook Pro laptop computers in 2016. SAC at ¶ 16. It touted these new laptops as not only thin and sleek, but as having the highest quality monitor display of any Apple laptop. *Id.* at ¶16. As part of the redesign, Apple connected the control boards of these new MacBook Pros to the display monitors using thin, flat, and flexible “display backlight ribbon cables” that wrap tightly around the display controller board. *Id.* at ¶ 17, Fig. 2. The internal design and placement of these display backlight ribbon cables are nearly identical in the 13-inch and 15-inch MacBook Pros. *Id.* at ¶¶ 18, 23. Plaintiffs included close-up photographs of the insides of both size laptops that show their identical configuration and design. *Id.* at ¶ 18, Figs. 3–4.

While these display backlight ribbon cables allow for a sleeker design, they cause the display

monitors to fail with normal use of the laptops. As MacBook Pro owners open and close their laptops between uses, the thin display backlight ribbon cables stretch and rub up against the control board and tear. SAC at ¶ 19. The display backlight ribbon cables tear because they are not long enough and do not allow enough slack to handle the repeated opening and closing of the laptop covers (the “Defect”). *Id.* at ¶ 19, Fig. 5. When these cables tear and break down, they no longer properly connect the controller board and the display screen, which causes severe problems with the “best Mac display ever.” *Id.* at ¶ 16. The defective MacBook Pros experience a “stage lighting” effect, blocks of solid colors that obscure text and images, as well as eventual complete monitor failure. *Id.* at ¶¶ 20–22; Figs. 6–8. Because it takes repeated opening and closing of the laptops for the display backlight ribbon cables to tear, the Defect nearly always manifests itself outside Apple’s limited, one-year express warranty period. *Id.* at ¶ 25.

Apple knows the length of these cables leads to display failures. In 2017, Apple attempted to fix the Defect by making the display backlight ribbon cables two millimeters longer in both the 13-inch and 15-inch laptops. LaBerge Decl., at ¶¶ 4, 5. Apple’s 2017 addition of slightly longer cables has not fixed the Defect. Mr. Combs purchased a 2018 15-inch MacBook Pro, which started exhibiting “stage lighting” in March 2020 and failed that June. *Id.* at ¶¶ 69–72. Apple made Plaintiffs Taleshpour, Buscher, Bardin, Fielding Stewart, and Combs’ 15-inch MacBook Pros after its 2017 cable lengthening, but their laptops are still defective. *See* SAC at ¶¶ 33–78; LaBerge Decl., at ¶ 4.

Apple also knows its customers have widespread problems with their MacBook Pros because of the Defect. In 2019, Apple started a program to repair *only* the 13-inch, 2016 MacBook Pro, despite the Defect affecting all model year 2016 or later MacBook Pros. SAC at ¶ 30. Over 26,000 Apple consumers have signed a Change.org petition seeking to convince Apple to fix the Defect, which Apple’s MacBook Pro customers have dubbed “Flexgate.” *Id.* at ¶ 80. Apple’s customers have also posted complaints about Defect *on Apple’s own website*, many of whom vent their frustration that Apple decided to repair only the 13-inch, 2016 MacBook Pro and not the other models they purchased. *Id.* at ¶ 81. Apple’s own witnesses have knowledge of the Defect. Mr. LaBerge testifies about a “backlight issue” in the 13-inch, 2016 MacBook Pro that led to the 13-inch MacBook Pro Display Service Repair Program (“Service Program”). LaBerge Decl., at ¶ 6. Although the Service Program does not cover Plaintiffs’

1 and the putative class members' MacBook Pros, it shows Apple has direct knowledge of the defective  
 2 nature of the display backlight ribbon cables, as they are (absent minuscule differences in length)  
 3 configured and designed identically across all model year 2016 or later MacBook Pros. SAC at ¶¶ 18,  
 4 23.

5 **ARGUMENT**

6 **I. APPLE MISCHARACTERIZES PLAINTIFFS' ALLEGATIONS AND SEEKS AN**  
 7 **ADJUDICATION OF THE MERITS AT THE PLEADING STAGE.**

8 Rather than move to dismiss the case based upon Plaintiffs' actual allegations, Apple advances  
 9 its own "strawman" theories that Plaintiffs have never pled. Apple argues that Plaintiffs' theory of  
 10 liability is that all model year 2016 or later MacBook Pros have the same exact display backlight ribbon  
 11 cable size as the 13-inch, 2016 models, which Apple agreed to fix as part of the Service Program. Mot.  
 12 at 6:25–7:2. But Plaintiffs do not allege all MacBook Pros have the exact same size display backlight  
 13 ribbon cables, which is why Apple cannot cite to any paragraph in the SAC for that argument. Mot. at  
 14 7:18–22. Laptops with screens several *inches* larger may need cables a few *millimeters* longer to connect  
 15 to those larger screens. Thus, Plaintiffs allege that Apple designed the MacBook Pro cable attachment  
 16 mechanism nearly identically in both the 13-inch and 15-inch models. SAC at ¶¶ 18, 23. Plaintiffs  
 17 allege that cable mechanism is defective in both the 13- and 15-inch MacBook Pros. *Id.* at ¶ 23.

18 Apple also argues Plaintiffs allege that the MacBook Pros are all defective because each of them  
 19 have display backlight ribbon cables that are uniformly too short by exactly two millimeters (the  
 20 thickness of a nickel). Mot. at pp. 7:18–22; 9:25–26. Plaintiffs do not allege that theory either. The  
 21 two-millimeter addition to the backlight ribbon cables was *Apple's own* attempt in early 2017 to fix its  
 22 defective MacBook Pros—it is not Plaintiffs' theory of liability. LaBerge Decl., at ¶ 4. Plaintiffs allege  
 23 the cause of their display screen failures is display backlight ribbon cables that tear with use because  
 24 they are too short and wrapped too tightly. SAC at ¶ 19. They do not allege that the cables are too short  
 25 *by the same exact length* as the only model and year MacBook Pro that Apple has decided to fix.

26 Apple's Display Service Program only covers the 13-inch, 2016 MacBook Pros. LaBerge Decl.,  
 27 at ¶¶ 4, 5. The Defect, however, is much more widespread than that single year and size MacBook Pro.  
 28 [REDACTED]

1 [REDACTED]

2 [REDACTED] Apple manufactured several Plaintiffs' MacBook Pros well after  
 3 this two-millimeter addition, yet each of their MacBook Pros contained the Defect that led to monitor  
 4 failure. *Id.*, ¶ 5. If Apple's 2017 two-millimeter lengthening were a "fix," as Apple argues, no MacBook  
 5 Pro Apple manufactured after February 2017 would have the same Defect that is the subject of this  
 6 lawsuit. Each of the Plaintiffs' experiences and allegations demonstrate otherwise.

7 Apple attempts to disprove these "strawman" theories with the merits-laden Supplemental  
 8 Declaration of Jeffrey LaBerge. But while a district court may resolve disputed factual issues in order  
 9 to rule on a "factual" Rule 12(b)(1) motion, it may not do so where "the jurisdictional issue and  
 10 substantive issues are so intertwined that the question of jurisdiction is dependent on the resolution of  
 11 factual issues going to the merits of an action." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039  
 12 n.3 (9th Cir. 2004) (internal quotation marks omitted); *see also Equity Lifestyle Props., Inc. v. Cnty. of*  
 13 *San Luis Obispo*, 548 F.3d 1184, 1189 n.10 (9th Cir. 2008) ("The jurisdictional question of standing  
 14 precedes, and does not require, analysis of the merits.").

15 Mr. LaBerge declares the length of each Plaintiffs' MacBook Pro display backlight ribbon cable  
 16 to disprove Plaintiffs' allegedly "inaccurate" allegation that the 13- and 15-inch MacBook Pros' display  
 17 backlight ribbon cables "are the same length and have the same alleged defect." Mot. at 7:1–2. Mr.  
 18 LaBerge then offers the following unilateral findings of fact: because several of Plaintiffs' display  
 19 backlight ribbon cables are not the same length as those in the 13-inch, 2016 MacBook Pro, their display  
 20 failures are not "traceable" to Apple's framed "defect." LaBerge Decl., at ¶¶ 3, 4 , 5; Mot. at 9–13.  
 21 While Mr. LaBerge's declaration may support Apple's theory of Plaintiffs' case, it does not undercut  
 22 Plaintiffs' actual allegations that the cause of their display screen failures is display backlight ribbon  
 23 cables that tear with use because they are too short and wrapped too tightly. SAC at ¶ 19. Plaintiffs did  
 24 not allege that those cables are the same size in both the 13- and 15-inch MacBook Pros. Similarly,  
 25 Apple's own documents state the "root cause" of the Defect is simply a "short LED flex cable," not a  
 26 short cable in only the 13-inch 2016 model. Wheeler Decl., Ex. D.

27 In any event, Apple's purported "factual" attack asks this Court to adopt LaBerge's conclusions of  
 28 law and fact and perform exactly the kind of ultimate merits adjudication that it cannot do at the pleading

1 stage. *Safe Air for Everyone*, 373 F.3d at 1039 n.3; *Equity Lifestyle Props.*, 548 F.3d at 1189 n.10.

2 **II. PLAINTIFFS' ALLEGATIONS ESTABLISH ARTICLE III STANDING.**

3 To establish Article III standing, “there must be a causal connection between that injury and the  
 4 conduct complained of—i.e., plaintiff’s claimed injury must be ‘traceable’ to defendant’s acts or  
 5 omissions.” *Lujan v. Defenders of Wildlife* 504 US 555, 559–60 (1992). “[C]ourts have consistently  
 6 held that the Article III standard for showing that an injury is ‘fairly traceable’ to the defendant is  
 7 ‘relatively modest.’ ” *Phillips v. Apple Inc.*, 2016 WL 5846992, at \*8 (N.D. Cal. Oct. 6, 2016) (quoting  
 8 *Bennett v. Spear*, 520 U.S. 154, 171 (1997)). Whether a defect caused a plaintiff’s injuries is a fact-  
 9 intensive question properly directed at the summary judgment stage. *In re Carrier IQ, Inc.*, 78 F. Supp.  
 10 3d 1051, 1068 (N.D. Cal. 2015).

11 In any analyzing Article III standing challenges, courts in the Northern District follow “the Ninth  
 12 Circuit’s admonition that courts ‘should not be too rigid in applying standing requirements to proposed  
 13 classes.’” *Grace v. Apple Inc.*, 2017 WL 3232464, at \*9 (N.D. Cal. Jul. 28, 2017); *see also Brazil v.*  
 14 *Dole Food Co.*, 2013 WL 5312418 at \*8 (N.D. Cal. 2013); *Lanovaz v. Twinings N. Am.*, 2013 WL  
 15 2285221, at \*2 (N.D. Cal. 2013).

16 **A. None of the Plaintiffs Lack Standing for any Purported “Admission” or**  
 17 **“Concession” that Apple has Fixed the Defective MacBook Pros.**

18 Apple relies on allegations in Plaintiff Taleshpour’s original complaint that are not in the SAC  
 19 to support its standing argument. Apple argues that Plaintiffs’ allegation “that the longer backlight cables  
 20 in Plaintiffs’ devices are too short does not suffice” because Plaintiffs “conceded” Apple remedied the  
 21 defect present in the 13-inch, 2016 MacBook Pro when it increased the length of the backlight cables in  
 22 the 2018 MacBook Pros by two millimeters. Mot. at 8:1–8.

23 As a threshold matter, it is well-established that an amended pleading supersedes the original  
 24 pleading and renders it of no legal effect, unless the amended complaint incorporates by reference  
 25 portions of the prior pleading.” *Williams v. Cnty. of Alameda*, 26 F. Supp. 3d 925, 936 (N.D. Cal. 2014);  
 26 *see also PAE Gov’t Servs., Inc. v. MPRI, Inc.*, 514 F.3d 856, 860 (9th Cir. 2007). Moreover, Plaintiffs  
 27 amended their allegations to conform to the addition of new Plaintiffs’ experiences with their MacBook  
 28 Pros, which showed that the display backlight ribbon cables were also defective in later models of the

1 MacBook Pro. Amended allegations based upon this kind of “further investigation” are not  
 2 contradictory. *See Taison Comms. v. Ubiquiti Networks*, 2014 WL 2916472, at\*7 (N.D. Cal. Jun. 26,  
 3 2014). Plaintiffs amended allegations are not any kind of “admission” that Apple remedied the Defect  
 4 when it added two millimeters to the cables in 2017.

5       **B. Plaintiffs Bardin, Buscher, Combs, Fielding, Odogwu, Stewart, and Taleshpour’s**  
 6       **Display Screen Failures Are “Fairly Traceable” to the Defect.**

7 Apple claims “there is no causal nexus between these seven Plaintiffs’ purported injury and their  
 8 theory of liability that the backlight cables were two millimeters too short.” Mot. at 7:19–21. Apple  
 9 argues this is because it “did not incorporate the allegedly two-millimeter-too-short cables in their  
 10 devices,” but only in the 2016 13-inch MacBook Pro. *Id.* at 7:21–22. As explained above, Plaintiffs  
 11 allege that the MacBook Pros all use display backlight ribbon cables that tear because they are not long  
 12 enough and do not allow enough slack to handle the repeated opening and closing they are exposed to  
 13 due to the placement and configuration of the cables within the MacBook Pro. SAC at ¶ 18–19.

14 Plaintiffs allege that despite *both* the 13- and 15-inch MacBook Pros having the same essential  
 15 Defect, the Service Program only covers the 13-inch MacBook Pro. SAC at ¶ 31. Apple does not dispute  
 16 that all model year 2016 or later MacBook Pros use display backlight ribbon cables to connect the  
 17 lighting mechanism of the display screen to the display controller board, like those in 13-inch, 2016  
 18 MacBook Pro. Mot. at 6:25–27. Nevertheless, Apple argues that “[b]ecause the backlight cables in  
 19 MacBook Pros purchased by seven of the nine named plaintiffs are at least two millimeters longer than  
 20 those in the 13-inch MacBook Pros introduced in 2016 that are eligible for Apple’s service program,  
 21 these plaintiffs’ purported injuries are not traceable to the Alleged Defect.” *Id.* at 8:9–11.

22 Plaintiffs also allege the display backlight ribbon cables in model year 2016 or later MacBook  
 23 Pros are “substantially similar” to those in the 13-inch, 2016 MacBook Pro covered by the Service  
 24 Program and thus, are too short to withstand repetitive opening and closing. SAC at ¶¶ 18, 19, 23, 31.  
 25  
 26  
 27  
 28

1  
 2 █ This is in accord with Plaintiffs' allegations in the SAC: “[g]iven the substantial similarity of the  
 3 internal design of the two sizes of the MacBook Pro (13- and 15-inches), the cause of the [] defect is  
 4 identical for both size laptops.” SAC at ¶ 23.

5 These allegations satisfy Article III standing. *Grace*, 2017 WL 3232464 at \*9 (finding plaintiffs'  
 6 allegation of product “substantial similarity” satisfied Apple’s Article III standing challenge).

7       C.     **Plaintiffs Fielding, Knutson, Hayes, Buscher, and Taleshpour Allege Their Display**  
 8               **Failures Are “Fairly Traceable” To the Defect.**

9       Each of these Plaintiffs allege the Defect caused their monitors to fail. SAC at ¶¶ 20–22.  
 10 Specifically, Plaintiffs allege the defective MacBook Pros experience a “stage lighting” effect, blocks of  
   11 solid colors that obscure text and images, as well as eventual complete monitor failure. *Id.* at ¶¶ 20–22;  
   12 *Id.* at Figs. 6–8. These Plaintiffs further allege they each experienced a type of display failure that is  
   13 caused by the Defect. *Id.* at ¶¶ 35, 37, 41, 46, 51, 52, 56, 57, 61, 66, 71, 72, 76. And, each Plaintiff  
   14 alleges they would not have purchased or become owners of their MacBook Pros, or would have paid  
   15 significantly less for their MacBook Pros, had they known of the Defect. *Id.* at ¶¶ 38, 43, 48, 53, 58, 63,  
   16 68, 73, 78.

17       Apple claims Plaintiffs are wrong because the Defect actually only causes one kind of failure,  
   18 and their claims should be dismissed because Mr. LaBerge has alone “determined” their injuries are not  
   19 caused by the Defect. Mot. at 9:5–23; LaBerge Decl., at ¶¶ 6–8. This is purely a merits-based argument.  
   20 Mr. LaBerge is not the finder of fact and his conclusory declaration cannot form the basis for an  
   21 adjudication of the merits of Plaintiffs’ allegations. *See Safe Air for Everyone*, 373 F.3d at 1039 n.3; *see also In re Toyota Motor Corp.*, 754 F. Supp. 2d 1145, 1162 (C.D. Cal.2010) (“Standing merely requires  
   22 a redressable injury that is fairly traceable to Defendants’ conduct. Whether a plaintiff can recover for  
   23 that injury under a particular theory of liability is a separate question.”).

24       D.     **Plaintiffs Odogwu, Stewart, Combs, and Knutson Have Pled a Cognizable Injury-**  
 25               **in-Fact.**

26       Apple argues that Plaintiffs Odogwu, Stewart, Combs, and Knutson do not have standing to bring  
 27 their claims because they have not suffered a cognizable injury-in-fact. To support its arguments, Apple  
 28

1 relies on the Declaration of Matthew Foster (the “Foster Decl.”). To meet the Article III requirements  
 2 for injury-in-fact, a plaintiff’s injury must constitute “an invasion of a legally protected interest which is  
 3 (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.” *Lujan*, 504  
 4 U.S. at 560 (internal citations and quotation marks omitted). The injury is particularized if it affects the  
 5 plaintiff in a “personal and individualized way.” *Id.* at 560 n.1. “The injury may be minimal.”  
 6 *Preminger v. Peake*, 552 F.3d 757, 763 (9th Cir.2008).

7 Apple claims Plaintiff Knutson does not have standing because it replaced his defective display  
 8 free of charge. Foster Decl., at ¶ 4. However, Plaintiff Knutson paid \$771.80 to an authorized Apple  
 9 service provider for the replacement of his 15-inch, 2016 MacBook Pro display assembly. Knutson  
 10 Decl, at ¶¶ 3–8; *id.*, Exs. A, B. Therefore, Plaintiff Knutson has suffered a cognizable injury-in-fact.

11 Apple also claims Plaintiff Stewart and Plaintiff Odogwu do not have standing because they are  
 12 not the original purchasers of their MacBook Pros. But, these plaintiffs plead facts that allege an injury-  
 13 in-fact and establish standing. “There are innumerable ways in which economic injury from unfair  
 14 competition may be shown. A plaintiff may (1) surrender in a transaction more, or acquire in a  
 15 transaction less, than he or she otherwise would have; (2) have a present or future property interest  
 16 diminished; (3) be deprived of money or property to which he or she has a cognizable claim; or (4) be  
 17 required to enter into a transaction, costing money or property, that would otherwise have been  
 18 unnecessary.” *Grace*, 2017 WL 3232464 at\* 13.

19 Plaintiff Stewart has owned his laptop since he picked it up from an Apple store. Stewart Decl.,  
 20 at ¶ 3. He alleges Apple directly caused him concrete economic injuries, including repair cost damages  
 21 for the replacement of his display screen. *Id.* at ¶¶ 4–7; *id.*, Exs. A, B. Plaintiff Stewart’s injury is  
 22 particularized because he was directly affected by the failure of his MacBook Pro display in that he had  
 23 to pay \$725.20 to repair the display screen. SAC ¶ 67; *see also* Stewart Decl., at ¶¶ 4–7; *id.*, Exs. A, B.

24 Plaintiff Odogwu also alleges Apple directly caused him concrete economic injuries, including  
 25 the damages he incurred for having to replace his original MacBook Pro when it became inoperable by  
 26 purchasing a used laptop. SAC at ¶¶ 46, 47. Therefore, Plaintiff Stewart and Plaintiff Odogwu both  
 27 allege they were owners and users of their MacBook Pros who suffered actual financial injuries resulting  
 28 from Defect. *Id.* at ¶¶ 46, 47, 67. These economic injuries are traceable to Apple and are sufficient to

1 establish injury in fact. *See Grace*, 2017 WL 3232464 at \*13.

2       Although Apple claims Plaintiff Combs lacks standing because the original complaint “admitted”  
 3 Apple remedied the Defect in July 2018, Plaintiff Combs meets the requirements for Article III standing.  
 4 Mot. at 8:26–9:2. The model year 2018 MacBook Pros also suffer from the Defect and Plaintiffs filed  
 5 an amended complaint to reflect those facts. As explained *supra* Section I.A, an amended pleading  
 6 supersedes the original pleading. *See e.g.*, *Ferdik v. Bonzelet*, 963 F.2d 1258, 1262 (9th Cir.1992)  
 7 (“[A]fter amendment the original pleading no longer performs any function and is treated thereafter as  
 8 non-existent.”); *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1546 (9th Cir.1989)  
 9 (“[A]n amended pleading supersedes the original.”); *Stamas v. Cnty. of Madera*, 2010 WL 289310, at  
 10 \*4 (E.D. Cal. Jan. 15, 2010) (“[A]n amended pleading is a new round of pleadings ... and is subject to  
 11 the same challenges as the original (i.e., motion to dismiss, to strike, for more definite statement)).  
 12 Because Plaintiff Combs has not “admitted” that Apple has remedied any defects, he has alleged a  
 13 cognizable injury-in-fact.

14       All nine named Plaintiffs have standing because each Plaintiff has alleged an injury-in-fact that  
 15 is fairly traceable to the Defect. Therefore, the Court should deny Apple’s Rule 12(b)(1) motion to  
 16 dismiss because each Plaintiff has Article III standing.

17 **III. PLAINTIFFS’ ALLEGATIONS SATISFY THE PLEADING STANDARDS**

18       A ““motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted.””  
 19 *Gillgan v. Jamco Dev. Corp.*, 108 F.3d 246, 249 (9th Cir. 1997) (quoting *Hall v. City of Santa Barbara*,  
 20 833 F.2d 1270, 1274 (9th Cir. 1986)). To survive, a complaint must merely contain “a short and plain  
 21 statement of the claim showing that the [plaintiff] is entitled to relief.” Fed. R. Civ. P. 8(a)(2). In  
 22 reviewing a motion to dismiss, courts must accept all well-pleaded allegations as true and construe them  
 23 in the light most favorable to the nonmoving party. *See Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336,  
 24 337–38 (9th Cir. 1996). “A complaint should not be dismissed unless a plaintiff can prove no set of facts  
 25 in support of his claim which would entitle him to relief.” *Cahill*, 80 F.3d at 337–38.

26       **A. Plaintiffs Have Adequately Alleged Their Deceptive Trade Act Claims.**

27       While fraud claims must be alleged with particularity, “[m]alice, intent, knowledge, and other  
 28 conditions of a person’s mind may be alleged generally.” Fed. R. Civ. P. 9(b). To the extent that claims

1 do not rely on fraud, the heightened pleading standard of Rule 9(b) applies only to the particular  
 2 averments of fraud and not to the claim as a whole. *Vess v. Cib-Geigy Corp. USA*, 317 F.3d 1097, 1104–  
 3 05 (9th Cir. 2003). That “intermediate standard” requires the plaintiff “to provide some specificity in  
 4 their pleadings to put defendants on notice of the charges leveled against them.” *Faigman v. AT&T*  
 5 *Mobility LLC*, 2007 WL 2088561, at \*4 (N.D. Cal. July 18, 2007) (quoting *Nordberg v. Trilegiant Corp.*,  
 6 445 F. Supp. 2d at 1097–98) (finding CLRA claims were alleged with sufficient particularity).

7 However, a fraud by omission claim “can succeed without the same level of specificity required  
 8 by a normal fraud claim.” *Baggett v. Hewlett-Packard Co.*, 582 F. Supp. 2d 1261, 1267 (C.D. Cal. 2007)  
 9 (citations omitted). “[A] plaintiff in a fraudulent concealment suit will ‘not be able to specify the time,  
 10 place, and specific content of an omission as precisely as would a plaintiff in a false representation  
 11 claim.’ ” *Id.* at 1267 (internal citations omitted). A plaintiff need only plead a fraudulent omissions  
 12 claim with sufficient particularity “so that a defendant can prepare an adequate answer from the  
 13 allegations.” *Moore v. Kayport Package Exp., Inc.*, 885 F.2d 531, 540 (9th Cir. 1989).

14       **1. Plaintiffs’ Claims for Fraud by Omission Satisfy Rule 9(b)**

15       “To state a claim for fraudulent omission, the omission must be contrary to a representation  
 16 actually made by the defendant, or an omission of a fact the defendant was obliged to disclose.” *In re*  
 17 *Apple Inc. Device Performance Litig.*, 386 F. Supp. 3d 1155, 1175 (N.D. Cal. 2019) (internal citation  
 18 omitted) (emphasis added). “When a defect does not relate to an unreasonable safety hazard, a defendant  
 19 has a duty to disclose when (1) the omission is material; (2) the defect is central to the product’s function;  
 20 and (3) at least one of the following four factors is met: the defendant is the plaintiff’s fiduciary; the  
 21 defendant has exclusive knowledge of material facts not known or reasonably accessible to the plaintiff;  
 22 the defendant actively conceals a material fact from the plaintiff; or the defendant makes partial  
 23 representations that are misleading because some other material fact has not been disclosed.” *Id.* at 1176.  
 24 Lastly, a plaintiff must sufficiently plead reliance to state a fraudulent omission claim. *See Phillips*,  
 25 2016 WL 1579693 at \*6.

26           **a. The Omission Is Material.**

27       “A non-disclosed fact is material if the omitted information would cause a reasonable consumer  
 28 to behave differently if he or she was aware of it.” *In re Carrier IQ, Inc.*, 78 F. Supp. 3d at 1114 (internal

1 quotation marks and citation omitted). “Materiality usually is a question of fact that should be left to the  
 2 jury unless the statement at issue is obviously unimportant.” *Beyer v. Symantec Corp.*, 333 F. Supp. 3d  
 3 966, 978 (N.D. Cal. 2018) (internal quotation marks and citation omitted).

4 Plaintiffs allege all model year 2016 or later MacBook Pros have display screens that will,  
 5 eventually, fail. SAC at ¶ 130. Plaintiffs further allege the failure is caused by the tearing of the display  
 6 backlight ribbon cables, which are too short and do not provide enough slack to withstand the repetitive  
 7 opening and closing of the MacBook Pros. *Id.* at ¶ 19. A reasonable consumer would find these facts  
 8 important when choosing to purchase a laptop computer. Additionally, Plaintiffs alleged they would not  
 9 have purchased their MacBook Pros had they known of the Defect, or would have paid significantly less  
 10 for them. *Id.* at ¶¶ 38, 43, 48, 53, 58, 63, 68, 73, 78.

11 Plaintiffs have sufficiently alleged materiality. *In re MacBook Keyboard Litig.*, 2019 WL  
 12 1765817, at \*6 (N.D. Cal. Apr. 22, 2019) (denying Apple’s motion to dismiss plaintiffs fraud by  
 13 omission claims because plaintiffs alleged sufficient materiality); *see also In re Apple & AT&T Antitrust*  
 14 *Litig.*, 596 F. Supp. 2d 1288, 1310 (N.D. Cal. 2008) (denying Apple’s motion to dismiss plaintiffs fraud  
 15 by omission claims).

16                   **b. Plaintiffs Allege a “Central Function Defect.”**

17 To state an omission claim that does not relate to an unreasonable safety hazard, a “plaintiff must  
 18 plead that the defect was central to the product’s function.” *Hodsdon v. Mars, Inc.*, 891 F.3d 857, 863  
 19 (9th Cir. 2018). A defect is central to a product’s function when it “renders those products incapable of  
 20 use by any consumer.” *Id.* at 864.

21 Plaintiffs allege the Defect has interfered with their ability to use the MacBook Pros. SAC at ¶  
 22 35, 37, 41, 46, 51, 52, 56, 57, 61, 62, 63, 71, 72, 76, 77. Plaintiffs’ allege the defect materially impairs  
 23 the screen’s quality, as a “display screen with stage lighting, chunks of color that obscures other text and  
 24 images, and that eventually goes dark,” “render[s] laptops unusable and unfit for the ordinary purposes  
 25 for which a laptop computer is used.” *Id.* at ¶ 22. This Court has held that a defect that goes to “the  
 26 functionality of a keyboard” is a central function defect. *In re MacBook Keyboard Litig.*, 2019 WL  
 27 1765817 at \*6. A defect that goes to the functionality of a laptop’s screen is just as “central” as that of  
 28 its keyboard. Similarly, as the court in *Hodsdon* recognized, “[a] computer chip that corrupts the hard

1 drive, or a laptop screen that goes dark, renders those products incapable of use by any consumer.”  
 2 *Hodsdon*, 891 F.3d at 864 (emphasis added). Had Plaintiffs known about the display backlight ribbon  
 3 cable defect prior to purchase, they would not have purchased or become owners of their computers, or  
 4 would have paid substantially less for it—precisely because it interferes with a central function of the  
 5 laptop. SAC at ¶¶ 38, 43, 48, 53, 58, 63, 68, 73, 78.

6 **c. Apple Had Exclusive Knowledge of the Defect.**

7 Rule 9(b) does not apply to allegations of knowledge and intent. Fed. R. Civ. P. 9(b). Thus,  
 8 Plaintiffs only need allege facts raising “a plausible inference” that defendant had exclusive knowledge  
 9 of the defect. *Avedisian v. Mercedes-Benz USA, LLC*, 2013 WL 2285237, at \*7 (C.D. Cal. May 22,  
 10 2013). Moreover, “exclusivity is analyzed in part by examining whether the defendant had ‘superior’  
 11 knowledge of the defect.” *In re MacBook Keyboard Litig.*, 2019 WL 1765817 at 7\* (finding that  
 12 plaintiffs pled adequately the “exclusive knowledge” element).

13 Plaintiffs allege that Apple performs engineering tests on its hardware prior to release to ensure  
 14 reliability of its products (SAC at ¶ 29) and Apple does not dispute this. Plaintiffs further allege that  
 15 prior to purchase they were unaware their display screens were likely to fail, as conceded by Apple in  
 16 its chart highlighting that Plaintiffs’ purchase dates predate their complaints. Mot. at 16:13–24.  
 17 Plaintiffs allege this is because Apple deleted similar earlier complaints about the cable defect from its  
 18 discussion forums. SAC at ¶ 82.

19 These allegations detailing Apple’s testing and monitoring of complaints unequivocally raise a  
 20 plausible inference that Apple knew about the display backlight ribbon cable defect at the time Plaintiffs  
 21 purchased their MacBook Pros. *See e.g., In re MacBook Keyboard Litig.*, 2019 WL 1765817 at 6\*  
 22 (“Courts have found that allegations that [] address multiple specific sources of knowledge have raised  
 23 a plausible inference of the defendant’s knowledge); *see also, Aguilar v. Gen. Motors, LLC*, 2013 WL  
 24 5670888, at \*5 (E.D. Cal. Oct. 16, 2013) (holding plaintiff sufficiently alleged defendant had knowledge  
 25 of the defect where plaintiff claimed “the pre-release testing data that allegedly shows the [] defect  
 26 necessarily would have given [defendant] knowledge of the [] defect prior to the date of sale.”);  
 27 *Kowalsky v. Hewlett-Packard Co.*, 2011 WL 3501715, at \*5 (N.D. Cal. Aug. 10, 2011) (finding plaintiff  
 28 alleged facts to raise a plausible inference that defendant knew of the alleged defect because plaintiff

1 alleged “that the testing, along with contemporaneous consumer complaints, would have given  
 2 [defendant] knowledge about the defect.”).

3 Apple argues Plaintiffs’ allegations regarding consumer complaints are insufficient to impute  
 4 knowledge of the defect to Apple. But Plaintiffs pled that the customer complaints in the SAC are only  
 5 “[a] small sampling.” SAC at ¶ 81. Moreover, Plaintiffs’ allegations in the SAC regarding customer  
 6 complaints distinguish this case from the allegations made in the cases those Apple cites. In *Oestreicher*,  
 7 plaintiff’s complaint contained “[r]andom anecdotal examples of disgruntled customers posting their  
 8 views on websites at [] unknown time[s]” and contained “no allegations that [defendant] knew of the  
 9 customer complaints at the time plaintiff bought his computer.” *Oestreicher v. Alienware Corp.*, 544 F.  
 10 Supp. 2d 964, 976 n.9 (N.D. Cal. 2008). Here, the sampling of complaints in the SAC explicitly mention  
 11 the defective flex cables, the 13-inch Display Service Repair Program, and how models other than those  
 12 included in the Repair Program are experiencing the same display screen failures that *are* covered by the  
 13 program. SAC at ¶¶ 79–82.

14 In *Elfaridi*, the court held plaintiffs did not establish defendants’ knowledge of the defect at issue  
 15 because their allegations that defendant received thirty-three complaints over a period of nine years was  
 16 not sufficient. *See Elfaridi v. Mercedes-Benz USA, LLC*, 2018 WL 4071155, at \*5 (E.D. Mo. Aug. 27,  
 17 2018). Unlike the plaintiffs in *Elfaridi*, Plaintiffs allege over 26,000 consumers have signed a petition  
 18 to demand that Apple address “flexgate,” and have provided a sampling of complaints that span over a  
 19 period of two years. SAC at ¶¶ 80, 81.

20 Lastly, the plaintiffs in *Roe* and *Burd*t failed to allege that testing results *would have* alerted the  
 21 defendant of the defect. *See Roe v. Ford Motor Co.*, 2019 WL 3564589, at \*6 (E.D. Mich. Aug. 6, 2019);  
 22 *Burd*t v. *Whirlpool Corp.*, 2015 WL 4647929, at \*4 (N.D. Cal. Aug. 5, 2015). In stark contrast, Plaintiffs  
 23 plead that Apple’s “Reliability Engineers are responsible for leading and executing reliability tests on  
 24 Apple technologies such as stress tests, the development of new test procedures to quantify the reliability  
 25 of a design, and failure analysis result from these tests. Therefore, this intensive pre-release testing  
 26 would have alerted Apple to the tearing and ultimate failure of the backlight ribbon cables.” SAC at  
 27 ¶ 29.

28 ////

**d. Plaintiffs' Relied on Apple's Omission.**

To sufficiently plead reliance on defendant's fraudulent omission, a plaintiff must show that "had the omitted information been disclosed, one would have been aware of it and behaved differently." *Daniel v. Ford Motor Co.*, 806 F.3d 1217, 1225 (9th Cir. 2015) (internal quotation marks and citation omitted). Additionally, "[i]f an omission is material, the fact that one would have behaved differently can be presumed, or at least inferred." *Sud v. Costco Wholesale Corp.*, 229 F. Supp. 3d 1075, 1083 (N.D. Cal. Jan. 24, 2017) (internal quotation marks and citation omitted).

Each Plaintiff has alleged they visited the Apple website prior to purchasing or becoming owners of their laptops. SAC at ¶¶ 34, 40, 45, 50, 55, 60, 65, 70, 75; *see Beyer*, 333 F. Supp. 3d at 981 (holding plaintiff's allegation that he "reviewed the product page" was sufficient to show reliance under Rule 9(b)). Each Plaintiff alleges they saw representations that the MacBook Pros had Apple's "best display to date." SAC at ¶¶ 34, 40, 45, 50, 55, 60, 65, 70, 75. Thus, Plaintiffs have adequately pled that they would have been aware of the omitted information had it been disclosed. Plaintiffs also allege that they were unaware of the alleged defect at the time of purchase, but that they would not have purchased or became owners of the laptops, or would not have paid the price that they did, had they known about the Defect. *Id.* at ¶ 102. Accordingly, Plaintiffs have adequately alleged that they had an opportunity to receive information about the alleged defect had Apple disclosed it, and would have acted differently if the defect was disclosed.

Apple also argues Plaintiffs have not alleged the omissions they reviewed and relied on. Mot. at 12:7–8. However, where “Plaintiffs do not premise their fraudulent omission claims on any ‘particular advertisement,’ . . . Plaintiffs are not required to ‘provide representative samples’ to the Court or to state specifically ‘where the omitted information should or could have been revealed.’ ” *Davidson v. Apple, Inc.*, 2017 WL 976048, at \* 9 (N.D. Cal. March 14, 2017) (internal citations omitted). Similarly, Plaintiffs base their omission claims upon a failure to disclose the Defect.

## **2. Plaintiffs Plead Adequate Claims for Affirmative Misrepresentation.**

Apple claims Plaintiffs have not alleged the misrepresentations that they reviewed and relied on with particularity. Mot. at 12:7–8. But Plaintiffs allege Apple at the time of sale, as well as prior to and after, made false and misleading representations concerning the MacBook Pro’s high quality display.

1 See e.g., SAC at ¶¶ 16, 98 (the “who”); *id.* at ¶¶ 32, 34, 40, 45, 50, 55, 60, 65, 70, 75, 99 (the “when”);  
 2 *id.* at ¶¶ 16, 34, 40, 45, 50, 55, 60, 65, 70, 75, 99 (the “where”); *id.* at ¶¶ 38, 43, 48, 53 ,58, 63, 68, 73, 78,  
 3 100–101 (the “what”). Plaintiffs also pled an example of an advertisement upon which they relied on.  
 4 See SAC at ¶ 16, Fig. 1.

5 Apple argues incorrectly that Plaintiffs have not identified *any* actionable statement. Contrary  
 6 to Apple’s assertion, Plaintiffs do allege specific false and actionable statements they relied upon in  
 7 making their decisions to purchase or becoming owners of their MacBook Pros. Specifically, Plaintiffs  
 8 plead the following:

- 9 • Apple described these laptops as “revolutionary” and “groundbreaking,” with “breakthrough  
 10 performance” SAC at ¶ 16;
- 11 • Apple described the displays as its “brightest and most colorful Retina display yet” *id.*;
- 12 • Apple’s senior vice-president of World Marketing claimed the new MacBook Pros had “the  
 13 best Mac display ever” *id.*;
- 14 • An Apple advertisement for the 2016 MacBook Pro Models provides as follows: “The best  
 15 Mac display ever delivers images that are more vivid, reveal even greater detail and appear  
 16 more lifelike than ever. As thin as a MacBook display at .88 mm, the Retina display on the  
 17 new MacBook Pro at 500 nits of brightness is an amazing 67 percent brighter than the  
 18 previous generation, features 67 percent more contrast and is the first Mac notebook display  
 19 to support wider color gamut” *id.*, Fig. 1.

20 These statements are not mere puffery, especially when viewed in the context of Apple’s  
 21 promotional campaign for the MacBook Pros, which stressed that the new display screens are the best  
 22 in the computer industry. *See, e.g., Beyer*, 333 F. Supp. 3d at 977 (“Symantec’s statement that its  
 23 software is ‘industry leading’ could lead a reasonable consumer to believe that Symantec software would  
 24 adhere to industry best practices. That is a reasonable inference for purposes of the motion to dismiss.”);  
 25 *Demetriades v. Yelp, Inc.*, 228 Cal. App. 4th 294, 311 (2014) (“[A] statement that is quantifiable, that  
 26 makes a claim as to the specific or absolute characteristics of a product, may be an actionable statement  
 27 of fact while a general, subjective claim about a product is non-actionable puffery.” (quoting *Newcal  
 28 Indus., Inc. v. Ikon Office Solution*, 513 F.3d 1038, 1053 (9th Cir. 2008))).

1 Furthermore, Plaintiffs explicitly alleged that they relied on representations by Apple when  
 2 deciding to purchase their MacBook Pros. *See* SAC at ¶¶ 34, 40, 45, 50, 55, 60, 65, 70, 75, 99. As  
 3 explained above, Plaintiffs include comments made by Apple's senior vice-president of World  
 4 Marketing, an Apple advertisement, and statements on Apple's website in the SAC. *See id.* at ¶ 16.  
 5 Apple does not deny that it made any of these statements. Therefore, Plaintiffs have alleged that Apple  
 6 made those statements, and have expressly alleged that they relied on those false and deceptive  
 7 statements when deciding to purchase their MacBook Pros. *See id.* at ¶¶ 16, 34, 40, 45, 50, 55, 60, 65,  
 8 70, 75, 99.

9 Lastly, Apple argues that its "only representation about durability was the Limited Warranty,  
 10 which does not guarantee that MacBook Pros will be defect-free, but rather specifies that Apple will  
 11 repair or replace any covered defects in materials or workmanship during the Warranty Period." Mot.  
 12 at 13:18–21. Accordingly, "consumers could only expect the MacBook Pros to function properly for the  
 13 length of the Warranty Period." *Id.* at 14:1–2. Apple argues consumers should only expect their \$2,000  
 14 MacBook Pros to function properly for *at most one year*. In support of this argument, Apple cites to *In*  
 15 *re Sony*, 758 F. Supp. 2d 1077, 1091 (S.D. Cal. Nov. 30, 2010). However, in *In re Sony*, the  
 16 manufacturer's only representation about the product's ability to function properly was the express  
 17 warranty. See *In re Sony*, 758 F. Supp. 2d at 1089. Unlike in *Sony*, Apple tells consumers that its laptop  
 18 computers last for "four years."<sup>1</sup> [REDACTED]

19 [REDACTED] Given these specific  
 20 representations as to the product's life cycle, Apple's consumers can expect their expensive MacBook  
 21 Pros to last much longer than the mere one year Apple argues in its opposition.

22 **B. Plaintiff Taleshpour Pleads Adequate Unfair and Unlawful UCL Claims.**

23 The UCL creates a cause of action for business practices that are unfair, unlawful or fraudulent.  
 24 Cal. Bus. & Profs. Code § 17200. "Each prong of the UCL provides a separate and distinct theory of  
 25 liability." *In re iPhone Application Litig.*, 844 F. Supp. 2d 1040, 1071 (N.D. Cal. June 12, 2012) (quoting  
 26 *Lozano v. AT&T Wireless Servs., Inc.*, 504 F.3d 718, 731 (9th Cir. 2007)).  
 27

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28 <sup>1</sup> More Answers to Your Questions About Apple and the Environment (Sept. 24, 2020),  
<https://www.apple.com/environment/answers/>.

1           **1. The “Unfair” UCL Claim is Sufficiently Pled.**

2           “Under the unfairness prong of the UCL, a practice may be deemed unfair even if not specifically  
 3 proscribed by some other law.” *In re Carrier IQ, Inc.*, 78 F. Supp. 3d at 1115 (internal citation omitted).  
 4 California courts have used a balancing test to determine unfairness. *Id.* The “‘balancing test’ asks  
 5 whether the alleged business practice is immoral, unethical, oppressive, unscrupulous or substantially  
 6 injurious to consumers and requires the court to weigh the utility of the defendant’s conduct against the  
 7 gravity of the harm to the alleged victim.” *In re Apple Inc. Device Performance Litig.*, 341 F. Supp. 3d  
 8 at 464. Courts have also used the tethering test to determine unfairness, “which requires that the public  
 9 policy which is a predicate to a consumer unfair competition action under the unfair prong of the UCL  
 10 must be tethered to specific constitutional, statutory, or regulatory provisions.” *Herskowitz v. Apple Inc.*,  
 11 940 F. Supp. 2d 1131, 1145–46 (N.D. Cal. 2013) (internal quotation marks and citations omitted).  
 12 Additionally, “[u]nlike the other two UCL prongs, the lack of a duty to disclose does not necessarily  
 13 dispose of claims under the unfair prong.” *Hodsdon*, 891 F.3d at 865–66.

14           Courts in the Northern District routinely hold that the “unfair” prong is unsuited to adjudication  
 15 on the pleadings because “the balancing test required by the unfair business practice prong of section  
 16 17200 is fact intensive and is not conducive to resolution at the motion to dismiss phase.” *In re MacBook*  
 17 *Keyboard Litig.*, 2019 WL 1765817, at \*9; *see also In re iPhone Application Litig.*, 844 F. Supp. 2d at  
 18 1073; *Grace*, 2017 WL 3232464 at \*15. Because there is no factual record before the Court as to Apple’s  
 19 justifications and motives for its unfair conduct, or its conduct’s impact on Plaintiffs, the Court cannot  
 20 adjudicate the balancing test at the pleading stage.

21           Plaintiff Taleshpour states a claim under the balancing test. He alleges that Apple’s practice of  
 22 selling defective laptops without providing an adequate remedy to cure the defect, and continuing to sell  
 23 those laptops without full and fair disclosure of the defect, harms the public at large and is part of a  
 24 common and uniform course of wrongful conduct.” SAC at ¶ 95. Plaintiff Taleshpour further alleges  
 25 “[t]he gravity of harm resulting from Apple’s unfair conduct outweighs any potential utility.” *Id.*  
 26 Plaintiff Taleshpour also states a claim under the tethering test. Plaintiff Taleshpour has sufficiently  
 27 identified a California public policy of “requiring a manufacturer to ensure that goods it places on the  
 28 market are fit for their ordinary and intended purposes.” *Id.* at ¶ 93. He also alleges Apple has violated

1 this public policy because one of the MacBook Pros' most central functions, its display screen, is  
 2 defective. *Id.* Accordingly, Plaintiff Taleshpour has alleged Apple's conduct violated California public  
 3 policy legislatively declared in the CLRA and Song-Beverly Act.

4 Apple also argues Plaintiff Taleshpour's claim fails because he "has not alleged that his MacBook  
 5 Pro failed to function as warranted through the Warranty Period" and that he has not alleged a substantial  
 6 injury. Mot. at 24:4–9; However, as explained *infra* Sections II.C and B, Apple has breached the implied  
 7 warranty of merchantability because the MacBook Pro contains a latent defect that renders it unfit for  
 8 its ordinary purpose. *See also* SAC at ¶ 136. Accordingly, Apple's Motion to Dismiss Plaintiff  
 9 Taleshpour's claim under the unfair prong of the UCL should be denied.

10 **2. Apple's Conduct Was Unlawful Under the UCL.**

11 The UCL "unlawful" prong "borrows violations of other laws ... and makes those unlawful  
 12 practices actionable under the UCL." *Lazar v. Hertz Corp.*, 69 Cal.App.4th 1494, 1505 (1999).  
 13 "'[V]irtually any law or regulation--federal or state, statutory or common law--can serve as [a] predicate  
 14 for a ... [section] 17200 'unlawful' violation.' " *Klein v. Chevron U.S.A., Inc.*, 202 Cal.App.4th 1342,  
 15 1383–84 (2012) (citation omitted). Here, Plaintiff Taleshpour's "unlawful" claim is adequately stated  
 16 because, as discussed in *supra* Section II.A and *infra* Section II.C, he has adequately alleged his CLRA  
 17 and Song-Beverly Act claim.

18 **C. Plaintiff Taleshpour Pleads a Claim for Violation of the Song-Beverly Act.**

19 "The Song–Beverly Act provides that "every sale of consumer goods that are sold at retail in  
 20 [California] shall be accompanied by the manufacturer's and the retail seller's implied warranty that the  
 21 goods are merchantable." Cal. Civ. Code § 1792. Generally, the warranty of merchantability ensures  
 22 that goods are fit "for the ordinary purpose for which such goods are used." *Mexia v. Rinker Boat Co.*,  
 23 174 Cal.App.4th 1297, 1303 (2009). The "implied warranty of merchantability may be breached by a  
 24 latent defect undiscoverable at the time of sale, so [i]n the case of a latent defect, a product is rendered  
 25 unmerchantable, and the warranty of merchantability is breached, by the existence of the unseen defect,  
 26 not by its subsequent discovery." *Keegan v. Am. Honda Motor Co., Inc.*, 838 F. Supp. 2d 929, 948 (C.D.  
 27 Cal. Jan. 6, 2012). Importantly, there is no requirement that "the alleged defect must preclude any use  
 28 of the product at all." *Stearns v. Select Comfort Retail Corp.*, 2009 WL 1635931, at \*8 (N.D. Cal. June

1 5, 2009) (internal citation omitted).

2 Apple claims Plaintiff Taleshpour's allegations are insufficient to state a claim for breach of the  
 3 implied warranty of merchantability. To support its argument, Apple cites to *Baltazar v. Apple Inc.*,  
 4 2011 WL 3795013, at \*4 (N.D. Cal. Aug. 26, 2011). The plaintiffs in Baltazar "contend[ed] that the  
 5 iPad fails to meet 'reasonable consumer expectations' because it 'overheats so quickly under common  
 6 weather conditions that it does not function for prolonged use either outdoors, or in many warm  
 7 conditions, for a variety of common uses,'" and the court found Plaintiffs did not allege facts "tending  
 8 to show that the device fail[ed] to meet a 'minimum level of quality.'" *Id.* at \*4. Here, Plaintiff  
 9 Taleshpour has alleged that his MacBook Pro contains a defect that renders it unfit for the ordinary  
 10 purposes for which a laptop computer is used and would not pass without objection in the laptop  
 11 computer trade. SAC at ¶ 136. Additionally, Plaintiff Taleshpour specifically alleges that "the display  
 12 backlighting system stops working entirely which prevents the MacBook Pro from being used for its  
 13 core function, as a display screen with defects that severely affects its users' ability to clearly view text  
 14 and images on the monitors, and that eventually goes dark, rendering the laptop incapable of use by any  
 15 consumer." *Id.* at ¶ 136. Thus, Plaintiff Talehspour clearly alleges the MacBook Pro fails to meet a  
 16 minimum level of quality for a laptop computer.

17 Apple cites to *Kacsuta* to support its argument that a Song-Beverly claim should be dismissed  
 18 where a plaintiff has not alleged the defect "affected other uses for the computer." *Kacsuta v. Lenovo*,  
 19 2013 WL 12126775, at \*3 (C.D. Cal. July 16, 2013). Unlike the plaintiff in *Kacsuta*, Plaintiff Taleshpour  
 20 has specifically alleged that his MacBook Pro has become inoperable and therefore has had to purchase  
 21 a new laptop to replace his original MacBook Pro. SAC at ¶ 37.

22 Apple argues Plaintiff Taleshpour's latent defect argument fails because "the susceptibility of a  
 23 component part to wear and tear does not constitute a defect" because "[e]very manufactured item is  
 24 defective at the time of sale in the sense that it will not last forever." Mot at 22: 23–26. Apple cites to  
 25 *In re Sony* to support its argument. However, the court in *In re Sony* acknowledged that if a product  
 26 "fails after the warranty expires," plaintiff's "[c]laims regarding other buyer expectations and the  
 27 manufacturer's state of mind properly sound in fraud and implied warranty." *In re Sony*, 758 F. Supp.  
 28 2d at 1098–99 (S.D. Cal. Nov. 30, 2010). Here, Plaintiff Taleshpour alleges Apple breached the implied

1 warranty of merchantability because the MacBook Pro contains a latent defect that renders it unfit for  
 2 its ordinary purpose. SAC at ¶ 136.

3 Therefore, consumers are not required to “discover and report to the seller a latent defect within  
 4 [the one year duration] period.” *Daniel*, 806 F.3d at 1222. “[T]he fact that the alleged defect resulted in  
 5 [an injury] three years after the sale of the [product] “does not necessarily mean that the defect did not  
 6 exist at the time of sale.” *Ehrlich v. BMW of N. Am., LLC*, 801 F. Supp. 2d 908, 924 (N.D. Cal. Aug.  
 7 11, 2010); *see also Keegan*, 838 F. Supp. 2d at 948 (finding “failure to discover a defect within one-year  
 8 statutory period does not defeat [plaintiff’s] claim at this stage of the litigation”—on motion to dismiss—  
 9 and concluding plaintiff “adequately pled a claim” for breach of implied warranty under California’s  
 10 Song-Beverly Warranty Act).

11 **D. Plaintiffs Plead Adequate Implied Warranty of Merchantability Claims**

12 Apple claims Plaintiffs have not pled facts sufficient to establish their MacBook Pros were not  
 13 merchantable when sold. Mot. at 20: 16–17. As explained *supra* Section II.C, Plaintiffs have clearly  
 14 alleged that all model year 2016 or later MacBook Pros contain a defect that renders it unfit for the  
 15 ordinary purposes for which a laptop computer is used and would not pass without objection in the laptop  
 16 computer trade. Additionally, “[i]n the case of a latent defect, a product is rendered unmerchantable,  
 17 and the warranty of merchantability is breached, by the existence of the unseen defect, not by its  
 18 subsequent discovery.” *Mexia*, 174 Cal.App.4th at 1304–05.

19 Given these allegations, Plaintiffs’ pleading suffices to state a claim at this early stage of the  
 20 litigation. *See e.g., Allagas v. BP Solar Int'l, Inc.*, 2014 WL 4418216, at \*3 (N.D. Cal. Sept. 8, 2014)  
 21 (denying motion to dismiss because by pleading latent defect, Plaintiffs sufficiently stated a claim);  
 22 *Ehrlich*, 801 F. Supp. 2d at 924–25 (denying motion to dismiss due to latent defect and rejecting  
 23 defendant’s argument that any “breach occurred both after any implied or express warranty expired”);  
 24 *Daniel*, 806 F.3d at 1223 (holding California law “does not create a deadline for discovering latent  
 25 defects.” (internal quotation marks and citation omitted)).

26 Apple’s also claims Plaintiffs’ implied warranty claims fail due to its disclaimer located on  
 27 Apple’s website. Mot. at 19: 8–10. But, Apple’s disclaimer is not conspicuous. The size, font, location,  
 28 and heading calling attention to the disclaimer are relevant factors when analyzing conspicuousness.

1     See *Hammond Ent. Inc. v. ZPS Am. LLC*, 2013 WL 5814505, at \*3 (N.D. Cal. Oct. 29, 2013). Here, all  
 2 the headings in Apple’s Limited Warranty are identical. Singh Decl., Ex. A, B. Three of the sections  
 3 are in all-captitals. *Id.* Notably, the implied warranties disclaimer follows two all-capital provisions. *Id.*  
 4 Additionally, the entire Limited Warranty uses the same font. *Id.* Additionally, Apple in no way sets  
 5 off its disclaimer from the surrounding text, and instead places the disclaimer at the end of a series of  
 6 identical-in-appearance, all-capital provisions. See *Am. Licorice Co. v. Total Sweeteners, Inc.*, 2014 WL  
 7 5396214, \*8 (N.D. Cal. Oct. 22, 2014) (“The type disclaiming implied warranties is in no way ‘set off’  
 8 from the surrounding text, is in the same font as the surrounding text, and bears no ‘marks that call  
 9 attention to the language.’ ”). Apple also fails to present the Limited Warranty to the consumer at the  
 10 time of purchase. Rather, Apple provides “product literature,” after purchase, with a website address for  
 11 the consumer to access the Limited Warranty. Singh Decl., at ¶ 3. Therefore, consumers are not given  
 12 the Limited Warranty prior to purchase. Instead, they must visit Apple’s website to see the Limited  
 13 Warranty. Given these facts, Apple’s disclaimer is not conspicuous

14 **IV. IN THE ALTERNATIVE, PLAINTIFFS REQUEST LEAVE TO AMEND.**

15     When any possibility exists to amend to state a valid claim, courts must grant leave to amend.  
 16 *Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc.*, 368 F.3d 1053, 1061 (9th Cir. 2004). If a complaint  
 17 is dismissed for failure to state a claim, “leave to amend should be granted unless the court determines  
 18 that the allegation of other facts consistent with the challenged pleadings could not *possibly* cure the  
 19 deficiency.” *Bonanno v. Thomas*, 309 F.2d 320, 322 (9th Cir. 1962) (emphasis added). As discussed  
 20 above, Plaintiffs have pled their claims with sufficient facts. However, if the Court grants any portion  
 21 of Defendant’s motion, Plaintiffs respectfully request that they be granted leave to remedy the deficiency  
 22 by amending their complaint.

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## **CONCLUSION**

For the foregoing reasons, Plaintiffs respectfully request that the Court deny Apple's Motion to Dismiss in its entirety.

Dated: September 25, 2020

Respectfully submitted,

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